No. 10675

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

Appeal from the District Court of the United States for the District of Idaho, Eastern Division

H. B. THOMPSON
Salt Lake City, Utah

L. H. ANDERSON
Pocatello, Idaho
Attorneys for Appellants

No. 10675

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

Appeal from the District Court of the United States for the District of Idaho, Eastern Division

---

H. B. THOMPSON
Salt Lake City, Utah

L. H. ANDERSON
Pocatello, Idaho
Attorneys for Appellants

INDEX

CITATIONS

Cases: Page

Cases: Page

Miscellaneous:

No. 10675

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OREGON SHORT LINE RAILROAD COMPANY, a corporation, SAINT PAUL-MERCURY INDEMNITY COMPANY OF ST. PAUL, a corporation, and UNION PACIFIC RAILROAD COMPANY, a corporation,

Appellants.

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

JURISDICTION

This suit was instituted by the United States of America on behalf of the Shoshone and Bannock tribes of Indians under authority of Act of September 1, 1888, c. 936, 25 Stat. 452, and jurisdiction of the District Court was invoked under section 14 of that Act, which requires the railway company to execute a bond to the United States in the penal sum of $10,000.00 for the use and benefit of the Shoshone and Bannock tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to the tribes, or of their livestock, or by reason of fires originating in the

operaton of said railway. Said statute was passed in connection with a treaty made and concluded between the U. S. A. and said tribes of Indians on the 3rd day of July, 1868, (15 Stat. L. 673). A copy of the statute is set forth at pp. 49-54 infra, Appendix "1".

The case came on for trial before Honorable Chase A. Clark and a jury on the 18th day of October, 1943, and on the 19th day of October the jury returned a verdict in favor of the plaintiff and against the defendants as follows: $1,250.00 damages for the death of Ninip Toane; the sum of $1,250.00 damages for the death of Helen Toane, and the sum of $2,000.00 damages for personal injuries sustained by Frank Pooewe (R. 76, 219), upon which judgment was accordingly entered on the 20th day of October, 1943, (R. 77-78), following which defendants served and filed their Petition on Motion for Judgment Notwithstanding the Verdict, and Alternatively for a New Trial (R. 78-82), which was by the court denied on November 18, 1943 (R. 83). Notice of Appeal was filed January 3, 1944 (R. 83-84). The jurisdiction of this court is invoked under Section 128 of the Judicial Code, as amended, 28 USCA Sec. 225 (a).

STATEMENT OF THE CASE

This action arose out of a collision between a train operated by the Union Pacific Railroad Company, traveling south through the Fort Hall Indian Reservation, and a 1934 Chevrolet truck occupied by Frank Pooewe, Ninip Toane and Helen Toane and driven by Frank Pooewe. The accident occurred between 5 and 6 P. M. October 29, 1941, as said truck loaded with long poles attempted to cross the tracks from east to west at a point about one mile south of Fort Hall, Idaho, resulting in injuries to Frank Pooewe and the death of Ninip Toane and Helen Toane, all members of the Shoshone-Bannock tribes of Indians, and all of whom lived on the said Fort Hall Indian Reservation (R. 137-138, 153-155, 171-174, 177-179).

The complaint consists of seven counts; the first count is for damages in the sum of $10,000.00 for the death of Ninip and Helen Toane and personal injuries to Frank Pooewe, under the statute of September 1, 1888 (25 Stat. L. 452) (R. 2-12) and the bond given by the Oregon Short Line Railroad Company dated July 30, 1935, and given pursuant to said statute (R. 8-9); the second count, upon the same statute and bond for the death of Ninip Toane (R. 12-14); the third count upon the same statute and bond for the death of Helen Toane (R. 1416); the fourth count upon the same statute and bond for personal injuries sustained by Frank Pooewe (R. 16-18). The remaining three counts were stricken when the appellee elected to proceede upon Counts 1, 2, 3, and 4 only (R. 95-96). Briefly stated, the complaint, as to each count, merely alleges the making of the treaty, a

report of the Committee on Indian Affairs, the Act of Congress, the giving of the bond, and the occurrence of a railroad crossing collision in which two Indians were killed and one injured. (R. 2-18). No negligence was charged and none proven. Appellant answered admitting the report made to Congress on June 5, 1888 by the Committee on Indian Affairs, copy of which is attached to the complaint marked Exhibit A; admitted that an agreement was made on May 27, 1887 between the United States of America and the Shoshone and Bannock tribes of Indians, which was ratified and embraced within an Act of Congress approved September 1, 1888 (25 Stat. L. 452); admitted the execution of the bond set forth in the complaint (R. 57-59); denied that the defendants became liable or obligated under the bond or otherwise to pay any sum on account of the killing or maiming of any Indian occurring without fault or negligence (R. 59-60); admitted the collision, the death of Ninip and Helen Toane and that Frank Pooewe received some injuries (R. 60-61) and generally denied the other allegations in the complaint. Appellant then set up in its third defense that recovery under the statute and bond could not be had without fault or negligence (R. 62, 65, 66, 67), which was stricken by the court (R. 96). Appellants' Fourth Defense set up that the collision and ensuing injuries and deaths were caused solely by the acts and omissions of duty on the part of the occupants of the truck in driving upon the track immediately in front of the approaching train which could have been seen or heard in time to have avoided the collision if the occupants had looked or listened, and accordingly the acts and omissions of the occupants of the truck were the sole proximate cause (R. 63-64).

The court denied appellee's motion to strike this defense (R. 96-97). Similar answer was made to the remaining counts set forth in the complaint.

QUESTIONS PRESENTED

1. Whether under the Act of September 1, 1888 (25 Stat. 452) and the bond given thereunder the railroad company and the surety are liable for injuries to or the death of the Indians involved herein within the limits of the Fort Hall Indian Reservation in consequence of having been struck by a railroad train but without negligence on the part of the railroad company. This question is raised in appellants' Third Defense to each Count (R. 62), and which defense was by the court stricken (R. 96); exception to the court's instructions (R. 205-206) refusal to give appellants' requested instruction No. 1 (R. 206-207) and by petition on motion for judgment notwithstanding the verdict and alternatively for a new trial (R. 81).

2. Whether the verdict of the jury and the judgment entered therein can stand in view of the fact that the evidence establishes the proximate cause of the collision and resulting injuries and death of the occupants of the truck, to be the acts and/or omissions of the driver of the truck and the other occupants in going upon the track immediately in front of the approaching train without looking or listening, or both, for said train, when if they had looked or listened, they could have either seen or heard the

train in sufficient time to have stopped the truck before getting on the track. This question is raised by appellants' motion for a directed verdict (R. 189-190), appellants' petition on motion for judgment notwithstanding the verdict and alternatively for a new trial, para. 1 a (R. 78-79), and the court's refusal to give appellants' requested Instructions No. 7 (R. 208- 212-213) and 9 R. 208-209, 213-214).

3. Whether the verdict of the jury and the judgment entered thereon can stand with reference to the death of Ninip Toane and Helen Toane in view of the fact that no beneficiary sustained any pecuniary loss as the result of the death of Ninip Toane, and the pecuniary loss, if any, to any, or all beneficiaries of Helen Toane did not exceed $250.00. The question is raised by paragraphs I (b) and I (c) of appellants' petition on motion for judgment notwithstanding the verdict, and alternatively for a new trial (R. 79-81). See the court's instruction (R. 199-200).

4. Whether the evidence is sufficient to sustain any damages for funeral expenses and whether the court erred in overruling appellants' objection to the admission of evidence relating thereto. This question is raised by appellants' objection to the introduction of such evidence (R. 110-111, 112), and by its petition on motion for judgment notwithstanding the verdict and alternatively for a new trial. Para. I (d) and III (a) (R. 81).

STATEMENT OF FACTS

As already stated, the accident involved herein occurred between 5 and 6 o'clock P. M. on the 29th day of October, 1941, when a 1934 Chevrolet truck occupied by Ninip Toane, Helen Toane and Frank Pooewe was struck by a southbound railroad train as it attempted to cross the tracks at a point about one mile south of Fort Hall, on the Fort Hall Indian Reservation (R. 153-155, 171-174, 177-179).

The truck was being driven by Frank Pooewe. He and Ninip and Helen Toane had been to the mountains east of Fort Hall and were returning with a load of poles (R. 137-138). There were about eighty poles on the truck which measured about ten inches through at the butt end (R. 153) and the poles were as long as from the witness chair to the south door of the court room (R. 153), which distance measured 36 feet 6 inches (R. 186). The truck before reaching the crossing, traveled south parallel with the railroad track, and as it approached the crossing the driver testified he slowed down, shifted the gears and was traveling about 5 miles per hour as he made the right hand turn to cross over the track. When he made the turn to the right to cross, he was about 27 or 30 feet from the tracks (R. 154-155, 186). As the truck reached the first rail of the track Mrs. Toane said "here comes a train" (R. 155), and then the automobile stalled (R. 188).

The freight train was southbound and consisted of about 65 or 66 cars (R. 172) and was traveling about 40 miles per hour as it approached the crossing (R. 179). The electric headlight of the engine was burning brightly (R. 178), and

the whistle was being sounded and the engine bell was ringing. The head brakeman sitting on the left or east side of the engine saw the auto on the highway when the engine was about 200 yards north of the crossing (R. 172), blowing the whistle and moving at a speed of about 37 to 42 miles per hour (R. 173-174). As the auto was driven upon the track the engineer immediately applied the brakes of the train in emergency and did everything that could be done to stop or reduce the speed of the train to avoid a collision (R. 174-179). The accident could not have been avoided by the engineer (R. 181). The view of the approaching train was unobstructed (R. 174).

The collision resulted in the death of Ninip Toane and Helen Toane and personal injuries to Frank Pooewe (R. 139-140). All of the occupants belonged to the Bannock-Shoshone tribe (R. 98-99). Ninip and Helen Toane each had certain allotments consisting of approximately 173 acres of land (99, 101-102). Frank Pooewe had no land alloted to him (R. 102).

Helen Toane left surviving her, her mother Adelia Tootath Weiser, who was a grown woman at the time of the Nez Perce War (1877) (R. 106, 120), and if she was 20 years old then she would be about 84 years old at the time of Helen's death, with a life expectancy of about two years. A son Irving Toane born in 1915 and married was also a survivor (R. 113). Helen Toane also had one half brother and two half sisters (R. 121). Ninip Toane was survived by his son Irving Toane, and by his father, known only as

"Toane," a very old Indian who lives with his daughter at Fort Washakie, Wyoming (R. 170).

The only contribution made by Helen Toane during her lifetime was to her mother and it consisted of money, not to exceed $100.00, and about $20.00 worth of groceries at various times. Ninip Toane contributed nothing (R. 121-122). Both before and after Helen's death her mother sewed buckskin and was receiving a pension through the Indian Agency and she gets along fairly well on the pension (R. 124), she has a husband who farms (R. 124) and they both have land, but no cattle (R. 123).

Ninip Toane contributed to no one. His father was asked if Ninip contributed to his support during his son's lifetime, and his reply was "He contributed very little." He couldn't remember when he had last lived with his son, but it was "quite a while back" (R. 121, 170).

The funeral lasted four days, during which time considerable food was consumed by about 200 people attending the funeral (R. 109-110). The cost, excluding the beef, amounted to about $100.00 (R. 111), and the two beef cattle cost about $90.00 each (R. 163). The bills for food were paid from Ninip Toane's account at the Fort Hall Agency, and amounted to $63.28 (R. 113).

Irving Toane, the son of Ninip and Helen Toane, inherited all of the property of Ninip Toane and Helen Toane, and "anything she owned went to Ninip Toane and Adelia Weiser, and all of Ninip Toane's went to Irving Toane as the sole heir" (R. 115).

SPECIFICATION OF ERRORS

I.

The evidence is insufficient to support the verdict and the judgment entered thereon for the death of Ninip Toane and Helen Toane, and for injuries sustained by Frank Pooewe, or either of them, for the reason that the evidence will sustain no other finding and conclusion than that the sole proximate cause of the collision and the ensuing deaths and injuries was the act of the driver of the truck in attempting to cross the track with a large load of long poles in the immediate presence of a rapidly approaching train which could have been seen or heard by said driver and the occupants thereof, if either of them had looked or listened for said train which they were bound to do and give precedence to the train. (See paragraph I (a) of appellants' Petition on Motion for Judgment Notwithstanding the Verdict, and, Alternatively, for a New Trial. (R. 78).

II.

The evidence is wholly insufficient to support a verdict or judgment for $1,250.00, or in any amount on account of the death of Ninip Toane for the reason that there is no substantial or other evidence that any Indian or any other person sustained any damages or pecuniary loss on account of the death of Ninip Toane.

III.

The evidence is wholly insufficient to support a verdict or judgment for $1,250.00 or any other substantial amount on account of the death of Helen Toane for the reason that

the only evidence of pecuniary loss suffered by anyone was by her mother, Adelia Weiser, who, during the lifetime of her daughter Helen, received only about $100.00 in money in addition to a few groceries purchased at various times amounting to about $20.00 each.

IV.

The evidence is insufficient to sustain any damages for funeral expenses, because such expenditures were a proper charge of the estate of said deceased Indians, and no damages accrued to anyone on account thereof; and there was no authority in law for permitting recovery therefor.

V.

The evidence is insufficient to support a finding that any of the Indians described in the complaint and referred to in the evidence were killed or injured in consequence of the fault or negligence of any of the defendants, or their agents or servants, and accordingly no damages accrued to anyone against any of the defendants in consequence of the collision described in the complaint.

VI.

The court erred in overruling appellants' objection to the admission of the following evidence concerning funeral expenses:

1. The reasonable cost or expense of fruits, vegetables and other things, not including beef, amounting to $100.00 (R. 111) to which evidence objection was made that it was "incompetent, irrelevant and immaterial under any circumstances because if there were expenditures made

this is not the proper way to prove them. To establish what is the usual expenditure is not the measure of damages, or a proper measure of damages, but the measure is what is the proper expenditure here." (R. 110-111). The witness answered that about $100.00 would be a reasonable value for the food, including beef. (R. 111).

2. To the admission in evidence of appellee's Exhibits 1 and 1 a, covering money paid by the agency from the account, or out of the funds of the estate of Ninip Toane for food consumed, exclusive of beef, for the funeral, in the amount of $63.28 (R. 113) to which objection was made "first 'I assume that our general objection is overruled, and I object for the further reason that according to the bill of particulars some of this was furnished by one, and some another and it is my belief that these items rest on different basis. I should be given an opportunity to object to the various expenditures by the various persons. "* * * Object to that as the record would be the best evidence. No proper foundation is laid." (R. 112).

3. There were two beef killed for the funeral and the court permitted the witness to give testimony as to the value of the one owned by Ninip Toane, to-wit $90.00 (R. 162-163), to which objection was made that the evidence was "incompetent, irrelevant and immaterial because the funeral expenses paid out of the estate are not chargeable in a suit of this kind," following which the witness answered that the two beeves were worth $90.00 each (R. 162-163).

VII.

The court erred in denying the appellants' motion for a directed verdict in favor of all of the appellants for the reasons stated in said motion and for the reasons set forth in Specification of Error I.

VIII.

The court erred in instructing the jury that the Act of Congress of September 1, 1888, 25 Stat. 452, "contemplates and requires the payment of damages independent of negligence, also requires the payment of damages if the loss was occasioned by an inevitable and unavoidable accident" (R. 198), for the reason and "upon the ground that it is not within the theory, language or spirit of the bond or the statute that the Railroad Company or the Surety should be required to pay damages for loss occasioned by inevitable accident or an unavoidable accident" (R. 205).

IX.

The court erred in instructing the jury as follows: "The jury is instructed that in their popular sense, the words used in the Act of Congress of September 1, 1888, 25 Stats. 452 reasonably imported the broad purpose of saving the Shoshone and Bannock Tribes of Indians residing on the Fort Hall Reservation harmless, and of insuring them against loss occasioned by inevitable accident" (R. 198) for the reason and "upon the ground that neither the language of the statute or the bond given pursuant thereto import either in language or in law an obligation tantamount to or constituting insurance against loss, and does not insure against loss occasioned

by an inevitable accident and such is not the literal or legal purpose or intent of the language or spirit of either the statute or the bond." (R. 205-206).

X.

The court erred in instructing the jury as follows:

"The jury is instructed that by the Act of Congress of September 1, 1888, 25 Stats. 452, the railroad company indemnifies the Shoshone and Bannock tribes of Indians of the Fort Hall Reservation against any and all damages which may accrue to said tribes or either of them, or of their livestock, in the construction or operation of said railroad or by reason of fires originating thereby; and is an insurer in respect to such damages." (R. 198-199) for the reason and "upon the ground that neither the language of the statute or the bond given pursuant thereto import either in language or in law an obligation tantamount to or constituting insurance against loss, and does not insure against loss occasioned by an inevitable accident and such is not the literal or legal purpose or intent of the language or spirit of either the statute or the bond." (R. 206).

XI.

The court erred in refusing to give to the jury appellants' written requested instruction No. 1, reading as follows: "You are instructed in this suit that the defendants were required to and did give a bond to secure the payment of such damages as might accrue as a result of killing or injuring members of the Shoshone and Bannock Indians on the Fort Hall Reservation.

You are further instructed that damages do not accrue for the killing or injuring of a person without negligence or fault, and since no negligence on the part of either of the defendant railroad companies is established there is no liability on the bond, and you are directed to render a verdict against the plaintiff and in favor of the defendants." (R. 210) for the reason and "upon the ground that the statute provides only for the giving of a bond for the recovery of damages which may accrue to the Indians; and that damages do not accrue without wrong on the part of the party complained of, nor under the language or purpose of the statute and the bond except by fault or negligence or invasion of the (a) legal right by the party charged." (R. 206-207).

XII.

The court erred in refusing to give to the jury appellants' written requested instruction No. 7, reading as follows: "You are instructed that the law of Idaho requires travelers upon the highway and about to cross a railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the track. It is also the duty of the traveler to give way for the passage of trains and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears." (R. 212-213) for the reason and "upon the ground that the failure of the driver of the automobile and the other occupants to observe this law which was binding upon them was the proximate cause of their injuries, or if not the proximate cause of their

injuries, as a matter of law, was a proper subject for the consideration of the jury." (R. 208).

XIII.

The court erred in refusing to give to the jury the second paragraph of appellants' written requested instruction No. 9, reading as follows: "Where a collision occurs at a railroad crossing under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching train or engine and could have plainly seen it, if he had looked, or could have heard its signal if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees." (R. 213-214). The first paragraph of said instruction was given by the court and reads as follows: "You are told that the proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred." (R. 198), concerning which no complaint is made, but appellant excepted to the court's failure to give the second paragraph for the reason that said second paragraph "applies the definition to hypothetical facts or assumed facts in such a way as to enable the jury to make an application of the principle of law involved, in place of merely furnishing them with an abstract instruction." (R. 208).

XIV.

The court erred in striking from appellants' answer the third defense set up therein as to each of the First, Second, Third and Fourth Counts set forth in the complaint (R. 62, 65, 66, 67, 96) for the reason that it is not within the theory, language or spirit of the bond or the statute that the Railroad Company or Surety should be required to pay damages for loss occasioned by an inevitable accident or an unavoidable accident, and in the absence of negligence on the part of the railroad company, its agents, servants or employees in the operation of the train.

XV.

The court erred in denying appellants' Petition for Judgment Notwithstanding the Verdict, and Alternatively, for a New Trial, for the reasons set forth therein and for the reasons set forth in the foregoing specifications of error. (R. 78-83).

ARGUMENT

As heretofore stated, this action arises out of a collision between a railroad train and a truck on October 29, 1941, at a point about one mile south of Fort Hall on the Fort Hall Indian Reservation, resulting in injuries to one Indian and the death of two others. The action is based upon the same statute as that involved in U. S. vs. Oregon Short Line R. Co., (9th Cir.) 113 Fed. (2d) 212. That case, however, only involved the question of whether the United States must in such an action plead and prove negligence before a recovery could be had under the statute, and this court ruled that an averment of negligence on the part of the Railroad Company was not necessary. The case at Bar presents again that question for review, and also several others.

A portion of the Act of Congress (25 Stat. L. 452), which ratified the agreement made between the United States and the Bannock and Shoshone tribes of Indians on the 27th day of May, 1887, and granted to the Utah and Northern Railway Company a right of way through the Fort Hall Reservation is set forth in Appendix 1. The Act granted a right of way 200 feet wide to the Utah and Northern Railway Company and required that Company to pay the Indians $8.00 per acre therefor. Section 14 of the Act reads as follows:

> "That said railway company shall execute a bond to the United States ,to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannock tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of

> any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to affect an amicable settlement with the parties in interest to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States; Provided, That all moneys so recovered by the United States Attorney under the provisions of this section, shall be covered into the Treasury of the United States, to be placed to the credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior." (R. 6 and Appendix 1.)

Consistently with the provisions thereof and on the 30th day of July, 1935, the Oregon Short Line Railroad Company, successor to the Utah and Northern Railway Company, executed a bond, which is also set forth in the complaint (R. 8-9).

I.

THE PROXIMATE CAUSE OF THE COLLISION WAS NEITHER THE PRESENCE OF THE RAILROAD TRACK NOR THE OPERATION OF THE TRAIN, BUT THE ACT OF POOEWE IN DRIVING THE TRUCK ONTO THE TRACK IMMEDIATELY IN FRONT OF THE APPROACHING TRAIN, WHICH WAS IN PLAIN VIEW, AND WHICH HE AND THE OTHER OCCUPANTS OF THE VEHICLE WERE UNDER THE DUTY OF LOOKING FOR AND CHARGED WITH HAVING SEEN

(Errors I, VII, VIII, IX, X, XII, XIII)

For the foregoing reasons the court, after having refused to strike the defendants' fourth defense (R. 63, 96-97), erred in denying the defendants' requested instruction No. 7, which charged the Indians with the same duty of self-preservation as is incumbent upon a white man (error XII), in denying that portion of the defendants' requested instruction No. 9 embraced within assignment of error XIII, in instructing the jury that the defendants were liable for loss occasioned by inevitable and unavoidable accident (error VIII), and that the defendants were insurers (error IX). As appellants' counsel stated in their exception to the refusal to give their requested instruction No. 7, if the court was not prepared to hold as a matter of law that the proximate cause of the collision was the act of the Indians in the particulars above mentioned, it was a proper subject for the consideration of the jury (R. 208) it being the law of the case, under the previous refusal of the court to strike the fourth defense, at

the time the instructions were given, and they should have been correctly instructed with reference thereto, whereas under the charge as given this duty of the court was wholly ignored, and by the other instructions above mentioned the jury was charged in substance and effect that proximate cause was no defense and that the Railroad Company was an insurer against self-destruction.

The facts of the case are that the truck was traveling south on a highway which paralleled the track on the east and was loaded with about 80 poles about 36 feet long and about 10 inches thick at the butt end ((R. 137-138, 153, 186). Before the truck reached the crossing the driver reduced the speed to about five miles per hour and shifted gears; when he made the turn to the right to cross the tracks he was about 30 feet from the tracks, but neither the driver nor the occupants of the truck heeded the approaching train until the truck reached the first rail, when Mrs. Toane said "here comes a train" (R. 154-155, 188), notwithstanding the fact that there were no obstructions to the view of the train as it approached the crossing from the north with its headlights burning brightly, the whistle sounding and the bell ringing (R. 172-174, 178). As soon as the truck reached the track and stopped the engineer when about 200 yards from the crossing (R. 172) and proceeding at a speed of 40 miles per hour (R. 173-174, 179) immediately applied the brakes of the train in emergency and did everything that could be done to stop or reduce the speed of the train to avoid a collision, and everything was done that could have been done by the engineer to avoid a collision (R. 174, 179).

At the close of all of the evidence the appellants moved for a directed verdict (R. 189-190) upon the ground that the sole proximate cause of the accident was the act of the driver of the truck in driving upon the track immediately in front of a train which he could have seen or heard if he or the other occupants of the truck had looked or listened, which they were bound to do, before attempting to cross the track or before reaching a zone of danger. The collision was not the result of an inevitable accident because it was the duty of the driver to stop the truck if necessary and give precedence to the train. It was an inevitable risk that the driver and the occupants took and without any opportunity for the engineer of the train to avoid the collision. Therefore the proximate cause of the collision was not the result of anything the operators of the train did or did not do, but it was the act or omissions to act of the driver and occupants of the truck in failing to observe or heed the train and so regulate the vehicle as to give the train precedence. It was no different than if after the Indians had crossed the track they had immediately driven onto the Yellowstone Highway which parallels the track on the west without stopping at the arterial stop sign and were struck by a southbound automobile.

The duty of a traveler upon a highway, and these Indians were travelers on the highway, is well settled by the decisions of all the courts. The Idaho Supreme Court has laid down the following rule:

> "A person approaching a railroad-highway crossing, a danger and itself a warning, is required to exercise reasonable care for his safety, and to look and listen from a place of safety, and if necessary so to do,

> stop, and look and listen from a point where his observation is effective, and from where had he looked he could have seen, or heard had he listened. He may not go onto the crossing without reasonably using his senses, and while in a place of safety must effectively look and listen, and make sufficient careful observation to ascertain whether he may safely proceed before going upon the track, in order to avoid any possible accident from approaching trains, and his failure to do so is not excused by the railroad company omitting its statutory duties. While he need not necessarily keep his eyes continuously upon the railroad track, where there is no obstruction the traveler is bound to see what is plainly visible. Anyone who fails to observe the above caution, or thoughtlessly goes upon a crossing, his mind not then being diverted by anything not under his control, or chargeable to the railroad company, or which should reasonably be guarded against by the railroad company, as a hazard at the crossing, is guilty of contributory negligence, depriving him of the right to recover for any injury occasioned thereby. If he chooses to take risks, he must bear the possible consequences thereof."
>
> Whiffin vs. Union Pacific R. Co., 60 Ida. 141, 89 Pac. (2d) 540, 546.

Contributory negligence, which the court refers to, is under the circumstances of this case only proximate cause, and we perceive no less amount of duty on the part of an Indian who travels upon the highway than any other person. The Act, in our opinion, was never intended to permit a recovery for injuries to Indians who had no one to blame except themselves for an unfortunate accident which may befall them such as the one in the case at Bar.

The court instructed the jury that the Act did "not contemplate and require the payment of damages if the acts of

the parties complainant was the proximate cause of the injury" (R. 198), following which the court defined proximate cause as follows:

> "You are told that the proximate cause of any injury is a cause which in its natural and continuous sequence, unbroken by any new cause, produces an event, and without which the event would not have occurred." (R. 198).

Therefore, from the facts as heretofore recited and which are undisputed, and applying the definition of proximate cause to them, there is no escape from the proposition that the jury did not follow the court's instructions, undoubtedly because of the other conflicting instructions above mentioned, and it is also our opinion that under the facts and consistent with the court's instructions on proximate cause, the court should have granted appellants' motion for a directed verdict and denied a recovery to the plaintiff. The following cases we believe fully support our position:

St. Louis I. M. & S. R. Co., vs. Commercial Union Insurance Co., 139 U. S. 223, 35 L. Ed. 154;

Memphis Railroad Company vs. Reeves, 77 U. S. (10 Wall) 176, 19 L. Ed. 909;

Atlantic Coast Line R. Co., vs. Driggers, 279 U. S. 787, 73 L. Ed. 957;

Southern Railway Company vs. Walters, 284 U. S. 190;

Southern Railway Company vs. Youngblood, 286 U. S. 313;

Rowe vs. Northern Pacific Railway Company, 52 Idaho 649, 17 Pac. (2d) 352;

Ranstrom vs. Oregon Short Line R. Co., 18 Fed. Supp. 256.

Certainly there could have been no recovery under the statute or the bond herein involved if these Indians had run into the side of the train as the train was passing over the crossing, for their act would have constituted the proximate cause of the collision just as it did in Southern Railway Company vs. Walters, supra, or in Rowe vs. Northern Pacific Railway Company, supra, where the courts held that a verdict should have been directed in favor of the railroad companies.

The Federal District Court in Ranstrom vs. Oregon Short Line R. Co., supra, denied a recovery in a similar case and held that the driver's act of running into the side of the train constituted the proximate cause.

See also:

Davis vs. Kennedy, 266 U. S. 147;

Atlantic Coast Line R. Co., vs. Davis, 279 U. S. 34.

Under the Federal Employers Liability Act contributory negligence is not a defense but results only in the diminution of damages ,or in other words amounts to only comparative negligence. Nevertheless the United States Supreme Court has held, as have other courts, that an employee's act may be such as to constitute the sole proximate cause of the injury and therefore operates to deny a recovery as a matter of law. See the annotation in Davis vs. Kennedy, supra, 266 U. S. 147.

A very similar and pertinent illustration is an action by an employee against a Railroad Company for violation of the Safety Appliance Act. That act imposes an absolute duty upon the employer by which the employers common law duty is superseded.

> Tipton vs. Atchison T. & S. F. R. Co., 298 U. S. 141, 80 L. Ed. 1091.

The ruling of this court in United States vs. Oregon Short line R. Co., supra, 113 Fed. (2d) 212, imposes no greater duty on the Railroad Company than is imposed under the Safety Appliance Act, and under the Safety Appliance Act the United States Supreme Court has said:

> "The rule clearly deducible from these four cases is that * * * * an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury;"
>
> Davis vs. Wolfe, 263 U. S. 239, 68 L. Ed. 284, 287.

In the case at Bar the Railroad Company was operating its train in a lawful manner and was not in any respect violating either Section 14 of the Act in question or the bond which was given in connection therewith. The presence of the train was merely a condition, and under the facts established upon the trial the court should have directed a verdict in favor of the defendants, but in the absence of so doing he should have intelligibly instructed the jury on the law of proximate cause, and not have set that defense at naught by

stating that the Railroad Company was an insurer, even against inevitable accident.

II.

THE COURT ERRED IN DENYING APPELLANTS' REQUESTED INSTRUCTION NO. 7 AND THE SECOND PARAGRAPH OF REQUESTED INSTRUCTION NO. 9

(See Specifications of Error XII and XIII)

These two requested instructions are allied with the subject just discussed and relate to proximate cause. As stated above, the court instructed the jury in effect that no damages could be awarded if the acts of the Indians were the proximate cause of the injury, and then defined proximate cause. These were merely abstract instructions and left the jury without anything to guide them in applying the facts to the law as announced in the court's instructions.

Requested Instruction No. 7 read as follows:

> "You are instructed that the law of Idaho requires travelers upon the highway and about to cross a railroad track to look and listen for trains and to stop the vehicle if necessary to determine whether it is safe to proceed across the track. It is also the duty of the traveler to give way for the passage of trains and the operators of a locomotive engine on the train have the right to assume that the traveler will perform his duties in that respect until the contrary appears."

This instruction was appropriate in the consideration of the question of proximate cause because it is a correct state-

ment of the law with respect to the duty of a traveler as announced by the Idaho Supreme Court in Whiffin vs. Union Pacific Railroad Company, 60 Idaho 141, 89 Pac. (2d) 540, 546, and which is the law throughout the entire country.

The second paragraph of requested instruction No. 9, and which the court refused to give, read as follows:

> "Where a collision occurs at a railroad crossing under such circumstances that the driver of the vehicle on the highway had a clear view of the approaching train or engine and could have plainly seen it, if he had looked, or could have heard its signal if he had listened before driving onto the track, and under such circumstances entered upon the track when the train or engine was so close to the crossing that a collision could not be avoided by those in charge of the movement of the train, then the proximate cause of the collision, and resulting injury, is the act of the traveler on the highway and not of the railroad employees."

The first paragraph of the instruction was given by the court and defined proximate cause as set forth above.

This requested instruction, like requested instruction No. 7, would have enabled the jury to apply the facts to the principle of law given by the court and it was prejudicial for the appellants for the court not to do so.

> "Each party has the right to have the jury instructed so clearly and pointedly as to leave no ground for misapprehension or mistake."
>
> Pickett vs. Gray, McLean & Percy (Ore.) 31 Pac. (2d) 652.

"It is a familiar and well established principle that a party litigant may demand submission of any theory of the case supported by substantial evidence. It does not satisfy this requirement that instructions be correct in the abstract, or that they be broad enough to include the proposition presented by the tendered instruction. It is the party's right to have an application of the law to *specific facts* on which he relies, if there be evidence of such facts." (Italics ours.)

Marcus vs. St. Paul Fire & Marine Ins. Co. (N. M.) 1 Pac. (2d) 567, 569.

In Grand Trunk Ry. Co., vs. Cobleigh (2 Cir.) 78 Fed. 784, 787, the court reversed a judgment for the plaintiff, saying:

"In his instructions the trial court judge did not give the jury any definition of contributory negligence beyond the statement that it consisted in the omission to use the care of a prudent man. We think the defendant was entitled to the benefit of a specific instruction defining the rule of contributory negligence applicable to the case of a person about to cross a railway track. In view of the instructions given and those which were refused, the jury were at liberty to adopt their own standard of prudent conduct, and accept one less rigorous than that adopted by the courts. The first of the requests refused presented the general rule which should have been given to the jury for a guide. The second presented a rule specifically applicable to a state of facts which they would have been warranted in finding established by the evidence."

In Panama R. Co., vs. Davies (5 Cir.) 82 Fed. (2d) 123, the law is stated in the syllabus:

> "Abstract principles should not be charged, but charges should be supported by evidence and be appropriate to the case."

In Northern Central Coal Company vs. Hughes, 224 Fed. 57, the Eighth Circuit Court of Appeals, speaking through Judge Sanborn, said:

> "The refusal of the court to give the instruction requested, therefore, violated the salutary rule that where the charge of a court states general rules of law governing the case, but fails to set forth the specific issues which the jury is called upon to determine and to apply the law to them, either party upon request is entitled to additional instructions which tersely and clearly state the crucial issues which the jury must determine and the law applicable to those very issues. A charge which presents to a jury specific issues which they are to decide, and applies to them the rules of law, makes the duty of the jury more perceptible, its discharge easier, and is more conducive to the just and speedy administration of justice than the statement of correct abstract legal propositions. Western Union Telegraph Co., v. Morris, 105 Fed. 49, 54, 55, 44 C. C. A. 350, 355, 356, and cases there cited; Frizzell v. Omaha Street Ry. Co., 124 Fed. 176, 180, 59 C. C. A. 382, 386; Cleveland C. C. & St. L. Ry. Co., v. McClintock, 91 Fed. 223, 227, 33 C. C. A. 466, 470; Railway Company v. Johnson, 90 Ga. 500, 16 S. E. 49.
>
> * * * * *
>
> "The instruction requested clearly and correctly stated a crucial issue in the case, the law applicable to it, and the duty of the jury regarding it, and it was fatal error to refuse to give it."

In Frizzell vs. Omaha St. Ry. Co., 124 Fed. 176, the court said:

> "A charge which applies to the facts of the case in hand the rules of law which govern the issues, and clearly states to the jury the crucial questions which they must answer, is much more helpful to them, and conduces far more to a just administration of the law, than abstract propositions of law or dissertations on sound theories, concerning the application of which to the issues they are to decide the jury is left in doubt."

To the same effect see:

Ralston vs. Plowman, 1 Idaho 595, 597;

Allen vs. St. Louis Transit Co. (Mo.) 81 S. W. 1142, 1146, 1147;

Union R. Co., vs. State (Md.) 19 Atl. 449;

Baltimore & O. R. Co., vs. Beck, (Ohio) 157 N. E. 485.

These instructions also correctly stated the law to the effect that operators in charge of a locomotive had the right to assume that a traveler would perform his duties in that respect until the contrary appeared, as announced in McIntire vs. O. S. L. Railroad Co., 56 Idaho 392, 55 Pac. (2d) 148, 150.

These decisions are in harmony with the decision of our District Court as announced in Ranstrom vs. Oregon Short Line R. Co., 18 Fed. Supp, 256, and the fact that a man is an Indian does not alter the case, for he is endowed with the same senses as any other human being and is not relieved from the legal consequences of his omission of duty in driving an automobile upon a highway or across a railroad track that is incumbent upon a white man. We believe this propo-

sition will not be disputed and that these two requested instructions should have been given for they bear directly upon the question of proximate cause as announced above and are in harmony with the rule announced by the Idaho Supreme Court in Rowe vs. Northern Pacific Ry. Co., 52 Idaho 649, 17 Pac. (2d) 352, where the court said:

> "The conclusion is inescapable that due to the unfortunate thoughtlessness of the car's occupants and their unwarranted assumption of a clearance at the time not apparent, the car came hurtling through the night with a momentum uncontrollable the remaining distance. The presence of the boxcar merely presented a condition, it was not the proximate cause of respondent's mishap."

In the Ranstrom case it was said:

> "Even admitting the negligence of the defendant, where the negligence of the driver is the proximate cause of the accident neither the driver nor the passenger can recover."

That the driver's acts and conduct were the proximate cause would have been much more apparent to the jury if the court had given appellants' requested instruction No. 7 and the last paragraph of No. 9.

As appears from the decisions above referred to in connection with proximate cause, the fact that the person who constituted the responsible agency in producing the proximate cause was negligent does not destroy the defense of proximate cause, as is apparent from the decisions in the Rowe case and the Ranstrom case which we have just cited. The statement is also supported by the decisions of the United States Supreme

Court, one of which is Atlantic Coast Line R. Co., vs. Driggers, 279 U. S. 787, in which it was held:

> "No liability under the Federal Employers Liability Act exists where the negligence of the injured employee himself was the sole and direct cause of the accident."

In the body of the opinion the court, after reviewing the facts, says:

> "Under these circumstances it is clear that Driggers by his own negligence as the sole and direct cause of the accident brought on his own death, and that there is no ground upon which the liability of the Railroad Company may be predicated."

III.

THE EVIDENCE IS WHOLLY INSUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT FOR THE SUM OF $1,250.00 EACH FOR THE DEATHS OF NINIP TOANE AND HELENE TOANE

(See Specifications of Error II, III and XV)

The court instructed the jury that the right to recover damages for the deaths of Ninip Toane and Helen Toane was "limited to the reasonable expectation of pecuniary benefits to particular individuals that may be proven in this case. If you find that no individual was deprived of a reasonable expectation of pecuniary benefits on account of the death of Ninip Toane or Helen Toane you will not award any damages to any one on account of the death of either of them." (R. 199-200.)

The court's instruction was correct.

Michigan C. R. Co., vs. Vreeland, 227 U. S. 59, 70, 57 L. Ed. 417, 422;

American RR Company vs. Didricksen, 227 U. S. 145, 57 L. Ed. 456;
Gulf C. & S. F. Ry. Co., vs. McGinnis, 228 U. S. 173, 57 L. Ed. 785;

Garrett vs. L. & N. R. Co., 235 U. S. 308;

Kansas City Southern R. Co., vs. Leslie, 238 U. S. 599;

Williams vs. Southern Pac. Co., 202 Pac. 356, 360.

The evidence with reference to pecuniary loss, if any, sustained by anyone as a result of the death of Helen Toane is that during Helen Toane's lifetime she had contributed money to her mother, Adelia Tootath Weiser not to exceed $100.00, and about $20.00 worth of groceries at various times. The testimony concerning this is as follows:

"Q. Do you know how much money Helen Toane gave altogether during her lifetime?

A. She don't know exactly, maybe better than a hundred dollars. She really doesn't know.

Q. Do you know how much food Helen Toane gave you when she was alive?

A. Sometimes she buys her about twenty dollars worth of groceries and sometimes she buys her a shawl.

Q. How often would she buy you food?

A. Sometimes it would be two weeks about, other times it would be a longer period than that.

Q. Sometimes it would be two weeks?

A. Yes.

Q. Could you tell us about how many times a month or a moon Helen Toane gave you food?

A. She said about every two months *sometimes.*

Q. Did this continue or last since she married Ninip Toane, or was it just part of the time,—did this last all of the time after she married Ninip Toane or part of the time after Helen Toane married Ninip Toane?

A. She said when she was small I used to provide her groceries and after she growed up she helped provide groceries for me.

Q. Are you married now?

A. Yes, to Sam Weiser."
(R. 122-123.)

The testimony concerning the contributions made is so uncertain and so unreliable that we believe it will not support any award whatsoever, but the most that can be said that it will support is an award of $100.00. The witness was not at all certain even as to this amount, nor was she certain as to the amount of food that Helen Toane bought her, either as to the amount paid for the food or the frequency of the purchases, or the period over which such purchases extended. Her mother, Adelia Weiser, testified that she was a grown woman at the time of the Nez Perce War, which was in 1877. If we assume that she was twenty years old at that time she would now be 86 years old. Helen Toane died over two years ago, so Adelia Weiser, so far as we can estimate from the testimony, was 84 years of age at the time Helen died, and according to the American Experienced Tables of Mortality, of which the court has judicial knowledge, her life expectancy was 3.08 years, two years of which had elapsed at the time of the trial. That is the greatest period of time that we may assume Adelia Weiser would have received either money or groceries, or anything else from Helen Toane. It is difficult to conclude from the evidence that Adelia Weiser sustained any pecuniary damages even on account of these few and uncertain contributions, for she says that she was

provided sustenance from the Fort Hall Agency afterwards in substantially the same manner as before the death of Helen Toane. She sewed buckskin and also received a pension through the agency, both before and after Helen's death (R. 124). There is no evidence that anyone else sustained any damages on account of the death of Helen Toane. Ninip Toane contributed nothing. (R. 121.)

With respect to Ninip Toane, the only testimony is that of his blind father, who was a very old Indian and who lives with his daughter at Fort Washakie, Wyoming (R. 170). His father's testimony is as follows:

"Q. Did Ninip Toane contribute to your support during his lifetime?

A. He contributed very little.

* * * *

Q. When was the last time you lived with him?

A. He doesn't remember exactly the years, it is quite a while back."

From this testimony there was nothing from which a jury could find a verdict for any amount. Accordingly it is clear that the jury wholly disregarded the instructions of the court and the evidence relating to damages.

Elements of damage within the realm of possibility but not fairly shown to be reasonably probable should be excluded in fixing an award.

Olson vs. U. S., 292 U. S. 246, 78 L. Ed. 1236.

The lower court should have corrected this, as to each Indian upon the grounds stated in par. I (b) and 1 (c) and par. II of the motion for new trial (R. 79-81).

IV.

THE COURT ERRED IN ADMITTING EVIDENCE WITH REFERENCE TO FUNERAL EXPENSES

(See Specifications of Error IV and VI)

As set forth in specification of error No. VI, the court admitted evidence as to the reasonable cost or expense of fruits, vegetables and other things amounting to $100.00, and also admitted in evidence appellee's Exhibits 1 and 1a, covering the amount paid by the Agency from the Account of or out of the funds of the estate of Ninip Toane for food consumed in the amount of $63.28 (R. 111-112), to which proper and specific objections were made as appears in said specification of error VI.

The only competent evidence concerning the value of food is that which was contained in Exhibit 1, and which was paid from the account of Ninip Toane. The $100.00 estimate given by the witness Lizzie Pokibro (R. 111) appears to be food furnished by others and not by anyone who was a beneficiary, and certainly no other person could furnish such articles and expect others to pay for them, for they were not legally bound to supply them, were volunteers and may not recover for such expenditures.

Iowa Homstead Co. vs. Des Moines Nav. RR Co., 84 U. S. 153;

In Re Malko Milling & Light Co., 32 Fed. (2d) 825, 828;

and particularly:

Vining vs. Rexford (3rd Cir.) 201 Fed. 904.

It was also testified that one beef belonging to Ninip Toane was slaughtered for the funeral and that the value of this beef was $90.00 (R. 162-163), but this, together with the amount of $63.28 paid by the Agency from the account of Ninip Toane (R. 113) as well as all other items relating to funeral expenses, was not admissible as evidence, for the Federal Courts have held with no exception that funeral expenses may not be recovered in a suit for damages on account of the death of a person.

The Culbertson, (3rd Cir.) 61 Fed. (2d) 194;

Hutchinson vs. West Jersey & S. R. Co., 170 Fed. 615;

Philadelphia, etc. R. Co., vs. Marland, 239 Fed. 1;

D. L. & W. R. Co., vs. Hughes, 240 Fed. 941, 943;

Heffner vs. Pa. RR Co., (2nd Cir.) 81 Fed. (2d) 28, 31;

Saucer vs. Willis-Overland Company, 49 Fed. (2d) 385;

Hoffman vs. Reading Co., 12 Fed. Supp. 1010;

Collins vs. Pa. RR Co., 148 NY Supp. 777.

A cogent reason for so holding is that an heir or beneficiary has not sustained damages merely on account of the

diminution of the estate, for before the heir could ever inherit the ancestor must have died, with the resulting expenditure by his estate of the expenses naturally and necessarily incidental to his burial.

V.

LIABILITY CANNOT BE IMPOSED ON DEFENDANTS IN THE ABSENCE OF NEGLIGENCE, AND NO "DAMAGES" "ACCRUED"

Under this heading we may properly and conveniently discuss specifications of error V, VIII, IX, X, XI, and XIV. This court has held that under the statute and the bond executed as required therein it is not necessary for the Government to allege and prove negligence (113 Fed. (2d) 212). Now that the case at Bar has come to trial upon the same statute and bond but upon a different cause of action many things have developed which we think establish the necessity for a reconsideration by this court of the question of negligence involved in its previous decision.

We think that a fair interpretation of the statute involved is that no new right of action for death is created. The Act referred to (Section 14) mentions nothing about any form of action, it merely requires that the railway company shall execute a bond to the United States "* * * conditioned for the *due* payment of any and all *damages which may accrue* by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the

construction or operation of said railway, or by reason of fires originating thereby; the *damages* in all cases, in the event of failure by the railway company to affect an amicable settlement with the parties in interest to be recovered in any court" etc. (Italics ours.) The law says that the bond is to be conditioned for the due payment of damages which "may" accrue. It doesn't say that damages *will* or *shall* accrue when an Indian is injured or killed. Therefore neither the statute nor the bond create any new or substantive right.

This law, and the treaty or agreement upon which it was based, says nothing about the need of protecting Indians in actions for damages except the execution of the bond. The Indians' rights were considered "jealously guarded and protected" when Congress compelled the railroad to pay for the land it was occupying, and required the filing of a bond to secure the payment of any damages which might accrue on account of the killing or maiming of any Indian as that language was then and still is commonly understood both in legal and common parlance, and which seems quite clear to have been the sole purpose of the agreement which Congress ratified (25 Stat. L. 452). Section 14 undoubtedly was thrown in to afford protection to the Indians in the event the railroad was financially unable to pay damages for a violation of an existing right which the Indians might have (depending upon the facts) along with other human beings. It certainly is as reasonable to suppose that Congress knew of the financial hazards the building of a new railroad entailed into country that first had to be developed before the railroad would receive any profit as it is to say that "there is nothing

in the committee report indicating uneasiness in Congress concerning the solvency of the railroad." Neither is there anything in the report which indicates that Congress was uneasy about the Indians being adequately protected if they had the same rights as others for damages "which may accrue." The report of the Committee in Congress (R. 50-56) does mention the fact that "indemnification by the railway company" was also provided in the bill and that, in and of itself, shows that the bond was to be given only as security. "Indemnity" means

> "* * * * a *collateral* contract or assurance, by which one person engages to secure another against an anticipated loss or to prevent him from being damnified by the legal consequences of an act or forbearance on the part of one of the parties or of some third person."
>
> Black's Law Dictionary (2d Ed.) 616.

The law as contended by this court is considered as a statute creating a new right, and certainly is in derrogation of common law so far as personal injury and property damages are concerned.

> "No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."
>
> Shaw vs. Merchant's Nat. Bank of St. Louis, 101 U. S. 557, 25 L. Ed. 89.

See also:

> Globe-Rutgers Fire Ins. Co., vs. Draper (9. Cir.) 66 Fed. (2d) 985;

Cox vs. St. Anthony Bank & Trust Company, 41 Idaho 776, 242 Pac. 785;

Sprague vs. Magee, 46 Idaho 622, 269 Pac. 993.

"The rules of the common law are not to be changed by doubtful implication, nor overturned, except by clear and unambiguous language."

25 R. C. L. 1054.

No right of action for death existed at common law.

The City of Vancouver (9 Cir.) 60 Fed. (2d) 793, 795;

Jenkins vs. Pullman Co. (9 Cir.) 96 Fed. (2d) 405, 409.

"* * * * when a lawmaking body passes a statute which, because of necessity, subjects a person to a liability to which he was not theretofore subject, the statute should be strictly construed."

Morrow vs. Asher, 55 Fed. (2d) 365, 367.

See also:

Ross vs. Jones, 22 Wall 576, 22 L. Ed. 730.

The rules above announced are so well established as to require no further support of authorities.

In U. S. vs. Shreveport Grain & El. Co., 287 U. S. 77 at page 83, the court, speaking of committee reports, said:

"In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be

> resorted to for the purpose of construing a statute contrary to the natural import of its terms. Wisconsin R. R. Commn. v. C. B. & Q. R. Co., 257 U. S. 563, 588-589; Penna. R. Co. v. International Coal Co., 230 U. S. 184, 199; Van Camp & Sons v. American Can Co., 278 U. S. 245, 253. Like other extrinsic aids to construction their use is 'to *solve* but *not to create* an ambiguity.'" Hamilton v. Rathbone, 175 U. S. 414, 421." (Italics ours.)

In the case at Bar the only purpose that can be served by resort to the words "jealously guarded" is to place a false emphasis and interpretation upon words which have both a clear and well established law and lay significance with a view to creating confusion in place of clarification. We think it is not an answer to these rules of law to say that because the Indians are wards of the Government the language of the statute should be given, as to them, an aided or unusual construction. That might be so as between the government and the wards, but in this case and similar cases the appellants' rights are involved also. In our brief upon the previous appeal, case No. 9403, 113 Fed. (2d) 212, we called attention, at pages 18-19, to the inapplicability of the rule governing the relation of the Government and its wards, as stated in Alaska Pacific Fisheries vs. U. S. 248 U. S. 78, cited at page 214 of the opinion to third parties with respect to whom no such rule had ever previously been announced, but we assume that this distinction escaped the attention of the court and the rule was consequently misapplied. The law as construed by the court is tantamount to making the provisions of the statute a penalty, and it cannot be said that it was in contemplation of the Indians and the Government that the rule should

be as announced by this court, for everything, it seems to us, points in the opposite direction. We believe that when Congress passed the Act it should have put in the statute words which clearly indicated that negligence was not a prerequisite to recovery if that was the intent; not having done so we believe that this court was in error in construing the statute so as to eliminate the necessity of pleading and proving negligence. It would have been so easy for Congress to have declared its intention to make the railroad company and its surety unconditionally liable if that had been its purpose, and it must be assumed that it would have done so if it had intended to make such a drastic departure from the settled rules.

Cases relating to fires, and the killing of livestock we think go no further than to make the act prima facie negligence and do not render the defendants liable as insurers. The legislatures in passing those acts clearly expressed their intent and left nothing for the court to construe. In cases such as the one at Bar we are dealing also with a human element, where both intelligence and the instinct and obligation of self-preservation exist, and we believe it was never the intent of Congress—certainly not expressed—that Indians should recover for a wrongful act of their own and which was the proximate cause of their misfortune. Whether a person be a ward or one that is emancipated, the law has never gone that far, and so in passenger cases, even if the railroad company might be considered an insurer there can be no recovery if the passenger's act or conduct was the proximate cause of his injuries. This exception seems to be quite clearly expressed in Chic.

R. I. & P. RR Co. vs. Zernecke, 183 U. S. 582, cited by this court in its opinion.

The rule of proximate cause is applied generally in suits based on the Federal Employers Liability Act, a highly remedial statute, to which a liberal construction is given.

See Note 367, Page 318, Sec. 51, Title 45, U. S. C. A.

Also to the Federal Safety Appliance Act (27 Stat. 531), the most highly remedial of all humanitarian statutes.

"By this legislation the qualified duty of the common law is expanded into an absolute duty with respect to car couplers," and by an omission of the duty the carrier incurs "the liability to make compensation to any employe who is injured because of it." L. & N. Railroad Company vs. Layton, 243 U. S. 617, 620, 621.

In the foregoing case and in the following others it is held that there can be no recovery under the statute unless its violation was the proximate cause of the injury.

St. Louis & S. F. R. Co. vs. Conarty, 238 U. S. 243;

McCalmont vs. Penna. R. Co. (CCA) 283 Fed. 736, 737 (3); (certiorari denied in 260 U. S. 751);

Lang vs. N. Y. Central R. Co., 255 U. S. 455, 458; Powell vs. Waters (Ga.), 190 S. E. 615, with numerous authorities cited at pages 618-619.

In the Conarty case it was said,

> "The principal question in the case is whether at the time he was injured the deceased was within the class of persons for whose benefit the Safety Appliance Acts required that the car be equipped with automatic couplers and drawbars of standard height; or, putting it in another way, whether his injury was within the evil against which the provisions for such appliances are directed. It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in injury to the deceased."

The judgment of the lower court in favor of the plaintiff was reversed.

Section 13 of the Act requires the Railway Company to fence its track where it runs through improved land. This would indicate that it was not the intention to discard negligence or proximate cause, for if the Railway Company was to be held liable absolutely and in any event, why require the Railway Company to fence except to keep the animals from getting killed? But we are dealing with liability—legal liability—under the statute, so if the Railroad Company constructed a lawful fence (and the Act doesn't say any other is required) we know from experience, and we think the court will take judicial notice of the fact also, that a lawful fence will not restrain sheep and hogs. Is the Railway Company then to be held liable where it has fully complied with the statute? If so, its act of fencing constitutes a useless act, or, having constructed a lawful fence and animals in exercising some of their propensities, either normal or vicious, knocked the fence down and are later injured and killed by a train, can it be said under any reasoning, law, or otherwise, that the

Railroad Company is responsible? If it can be thus said, then we submit the court must do so by judicial legislation, an act which the courts have always said will not be performed.

Section 14, in our opinion, merely implemented the existing Idaho death statute which was then in effect, Idaho Code of Civil Procedure (1881) Section 192. (Appendix 2.) See Section 5-311 Idaho Code Annotated, 1932; and as to personal injuries, it merely implemented the common law and gave security for payment for any rights the Indians *may* have as a result of existing law.

We believe that it is unnecessary to consider the reports of Congress in interpreting this Act, for the language appears to be clear and unambiguous.

> "They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms."
>
> U. S. of America vs. Shreveport Grain & Elevator Co., 287 U. S. 77, 77 L. Ed. 175, 178.

Nowhere in the Act is there a separate statement or section concerning liability. Section 14 merely requires the giving of a bond to secure what? To secure the payment of any liability that *may* legally arise from the violation of a duty owed by the Railroad Company to the Indians. No statute or common law duty has been violated by the railway company, hence no liability on the bond.

In cases involving shipments of nonperishable freight the rule is that carriers are liable as insurers, upon the theory that the carrier has the exclusive possession of the goods, but in

those cases the carrier has always been relieved from liability for "* * * loss or injury proximately resulting from the act or fault of the shipper or owner, without fault on the part of the carrier. This further exception to the carrier's common law liability comprehends every case where a loss is caused by the shipper's act, whether that act is one of *negligence*, *misconduct*, or *misfortune*." (Italics ours.)

9 Am. Jur. 865, Sec. 728.

> "The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' Levy v. M'Cartee, 6 Fed. 102, 110, 8 L. Ed. 334, 337. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.'"

Old Colony R. Co., vs. Commr. of Internal Revenue, 284 U. S. 552, 76 L. Ed. 484, 489.

Therefore the word "damages" in the Act should be construed accordingly.

> "* * * in statutes or other legal instruments giving compensation for 'damages,' the word *always* refers to some *actionable wrongful* loss, injury, or harm which results from the *unlawful* act, omission, or negligence of another." (Italics ours.)

15 Am. Jur. 387, Sec. 2.

In the case of Holmes vs. Holmes, 64 Ill. 294, 297, the Supreme Court of Illinois, quoting from Greenleaf on Evidence, says:

> "Damages are given as a compensation, recompense or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury, neither more nor less."

Webster's International Dictionary describes damages as:

> "The estimated reparation in money for detriment or injury sustained."

Worcester defines it as "payment for or indemnity for injuries."

From such authorities it must be presumed that Congress in using the word "damages" did not refer to or impose a penalty upon the Railroad Company and referred to only such damages as the Indians were entitled to under the common law.

No wrongful act of the Railroad Company having been committed no damages accrued to the Indians or their survivors.

The other points urged herein are, we submit, sufficient for a reversal of the verdict of the jury and the judgment entered thereon, but we respectfully urge the court to reconsider the question of negligence, for we cannot think that Congress ever intended to give to the statute the effect this court gave to it in its previous decision.

Respectfully submitted,

H. B. THOMPSON

L. H. ANDERSON

Attorneys for Appellants.

APPENDIX "1"

From 25 Stat. L. 452

AN ACT to accept and ratify an agreement made with the Shoshone and Bannock Indians, for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation, in the Territory of Idaho, for the purpose of a town-site, and for the grant of a right of way through said reservation to the Utah and Northern Railway Company, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a certain agreement made and entered into by the United States of America represented as therein mentioned, with the Shoshone and Bannock Indians resident in the Fort Hall Reservation in the Territory of Idaho, and now on file in the office of Indian Affairs, be, and the same is hereby, accepted, ratified, and confirmed. Said agreement is executed by a duly certified majority of all the adult male Indians of the Shoshone and Bannock tribes occupying or interested in the lands therein more particularly described, in conformity with the provisions of article eleven of the treaty concluded with said Indians July third, eighteen hnudred and sixty-eight (Statutes at Large, volume fifteen, page six hundred and seventy-three), and is in the words and figures following, namely:

"Memorandum of an agreement made and entered into by the United States of America, represented by Robert S. Gardner, U. S. Indian Inspector, and Peter Gallagher, U. S. Indian Agent, specially detailed by the Secretary of the Interior

for this purpose, and the Shoshone and Bannock tribes of Indians, occupying the Fort Hall Reservation in the Territory of Idaho, as follows:

ART. I. The said Indians agree to surrender and relinquish to the United States all their estate, right, title and interest in and to so much of the Fort Hall Reservation as is comprised within the following boundaries, that is to say: and comprising the following lands, all in town six (6) south of range thirty-four (34) East of Boise Meridian.

West one-half section twenty-five (25); all of section twenty-six (26); east one-half section twenty-seven (27); northwest quarter section thirty-six (36); north one-half section thirty-five (35); northeast quarter of southwest quarter section thirty-five (35) northeast quarter of northeast quarter of section thirty-four (34); comprising an area of eighteen hundred and forty (1840) acres, more or less, saving and excepting so much of the above-mentioned tracts as has been heretofore and is hereby relinquished to the United States for the use of the Utah and Northern and Oregon Short Line Railways.

The land so relinquished to be surveyed (if it shall be found necessary) by the United States and laid off into lots and blocks, as a townsite, and after due appraisement thereof, to be sold at public auction to the highest bidder, at such time, in such manner and upon such terms and conditions as Congress may direct.

The funds arising from the sale of said lands, after deducting the expenses of survey, appraisement, and sale, to be

deposited in the Treasury of the United States to the credit of the said Indians, and to bear interest at the rate of five per centum per annum; with power in the Secretary of the Interior to expend all or any part of the principal and accrued interest thereof, for the benefit and support of said Indians in such manner and at such times as he shall see fit.

Or said lands so relinquished to be disposed of for the benefit of said Indians in such other manner as Congress may direct; and

WHEREAS, in or about the year 1878 the Utah and Northern Railroad Company constructed a line of railroad running north and south through the Fort Hall Reservation, and has since operated the same, without payment, of any compensation whatever to the said Indians, for or in respect of the lands taken for right of way and station purposes; and

WHEREAS the treaty between the United States and the Shoshone and Bannock Indians, concluded July 3, 1868 (15 Stat. at Large, page 673) under which the Fort Hall Reservation was established, contains no provisions for the building of railroads through said reservation: Now, therefore,

ART. II. The Shoshone and Bannock Indians, parties hereto, do hereby consent and agree that upon payment to the Secretary of the Interior for their use and benefit of the sum of ($8.00) eight dollars for or in respect of each and every acre of land of the said reservation, taken and used for the purposes of its said railroad, the said Utah and Northern Railroad Company shall have and be entitled to a right of way not exceeding two hundred (200) feet in width,

through said reservation extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof, together with necessary grounds for station and water purposes according to maps and plats of definite location, to be hereafterfiled by said company with the Secretary of the Interior, and to be approved by him, the said Indians, parties hereto, for themselves and for the members of their respective tribes, hereby promising and agreeing to, at all times hereafter during their occupancy of said reservation, protect the said Utah and Northern Railroad Company, its successors or assigns, in the quiet enjoyment of said right of way and appurtenances and in the peaceful operation of its road through the reservation.

ARTICLE III. All unexecuted provisions of existing treaties between the United States and the said Indians not affected by this agreement to remain in full force; and this agreement to take effect only upon ratification hereof by Congress.

"Signed at the Fort Hall Agency, in the Territory of Idaho, by the said Robert S. Gardner and Peter Gallagher on behalf of the United States, and by the undersigned chiefs, headmen, and heads of families and individual members of the Shoshone and Bannock tribes of Indians, constituting a clear majority of all the adult male Indians of said tribes occupying or interested in the lands of the Fort Hall Reservation in conformity with article eleven of the treaty of July 3, 1868, this twenty-seventh (27) day of May, A. D., one thousand eight hundred and eighty-seven (1887)."

(Here follow the signatures.)

* * * *

SEC. 11. That there be, and is hereby, granted to the said Utah and Northern Railway Company a right of way not exceeding two hundred feet in width (except such portion of the road where the Utah and Northern and the Oregon Short Line Railways run over the same or adjoining tracks, and then only one hundred feet in width) through the lands above described, and through the remaining lands of the Fort Hall Reservation, extending from Blackfoot River, the northern boundary of said reservation, to the southern boundary thereof;

* * * *

SEC. 13. That said railway company shall fence, and keep fenced, all such portions of its road as may run through any improved lands of the Indians, and also shall construct and maintain continually all road and highway crossings and necessary bridges over said railway, wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be, by the proper authorities, laid out across the same.

SEC. 14. That said railway company shall execute a bond to the United States, to be filed with and approved by the Secretary of the Interior, in the penal sum of ten thousand dollars, for the use and benefit of the Shoshone and Bannock tribes of Indians, conditioned for the due payment of any and all damages which may accrue by reason of the killing or maiming of any Indian belonging to said tribes, or either of them, or of their livestock, in the construction or operation

of said railway, or by reason of fires originating thereby; the damages in all cases, in the event of failure by the railway company to affect an amicable settlement with the parties in interest to be recovered in any court of the Territory of Idaho having jurisdiction of the amount claimed, upon suit or action instituted by the proper United States Attorney in the name of the United States; Provided, That all moneys so recovered by the United States attorney under the provisions of this section, shall be covered into the Treasury of the United States, to be placed to the credit of the particular Indian or Indians entitled to the same, and to be paid to him or them, or otherwise expended for his or their benefit, under the direction of the Secretary of the Interior.

APPENDIX "2"

Idaho Code of Civil Procedure, (11th Sess. 1881) Section 192

Sec. 192. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just.